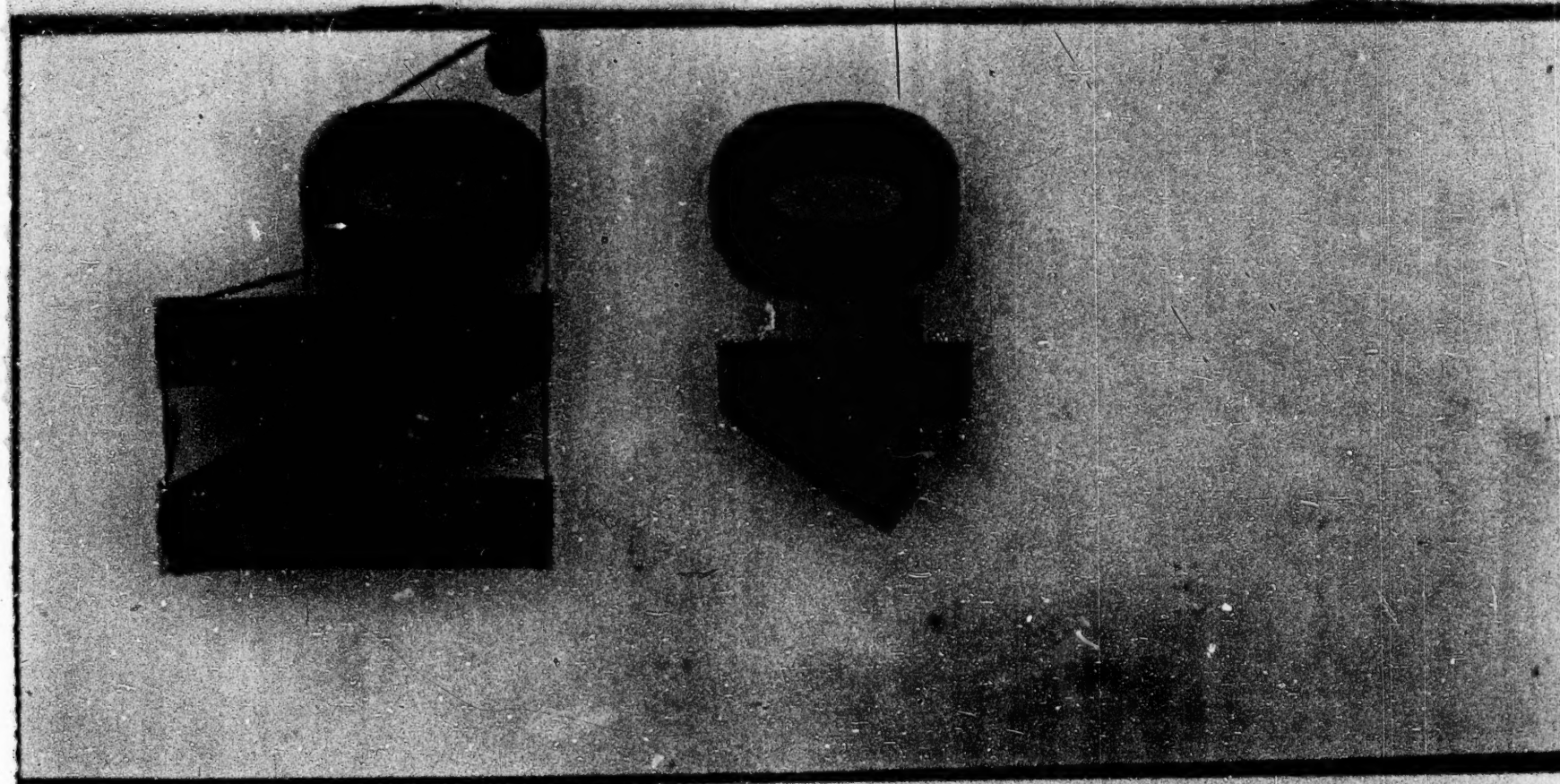

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948 1949

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No. [redacted] 40

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THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
*Appellants,*

*vs.*

THE CAPITAL TRANSIT COMPANY, THE PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA, ET AL.,
*Appellees.*

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

---

# STATEMENT OF PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

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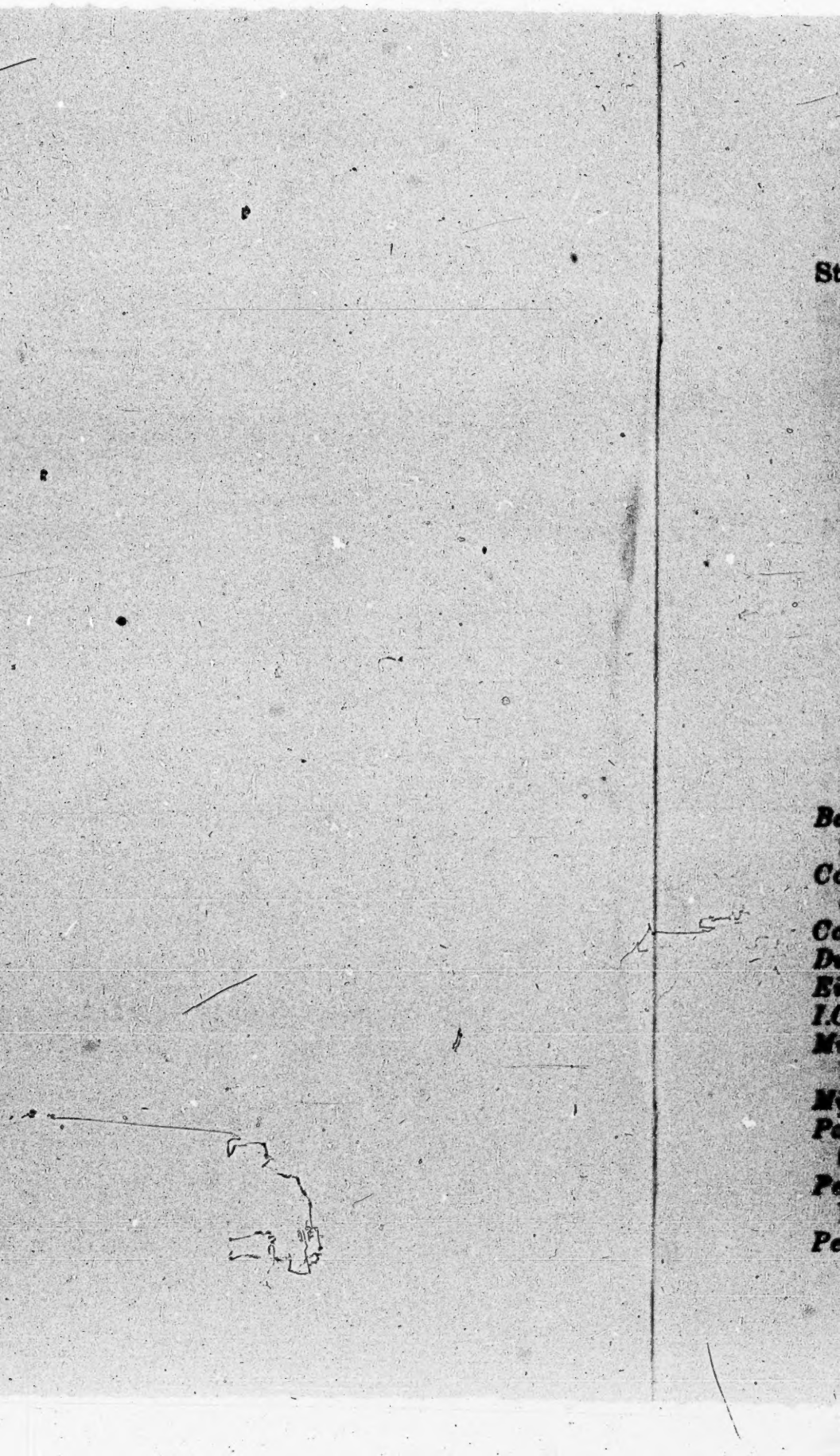

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

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# No. 629

---

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

*Appellants,*

*vs.*

CAPITAL TRANSIT COMPANY, A Corporation, et al.,

*Appellees*

---

## STATEMENT OF THE PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA AS TO JURISDICTION, AND MOTION TO AFFIRM THE JUDGMENT OR, IN THE ALTERNATIVE, TO DISMISS THE APPEALS.

---

The appellee Public Utilities Commission of the District of Columbia (District Commission), believing that the matter set forth herein below will demonstrate the lack of substance in the questions raised by the appeals in these consolidated causes, files this statement in opposition to the appellants' statement as to jurisdiction. Pursuant to Rule 12(3) of the Supreme Court, the District Commission includes herein its motion to affirm the judgment of the statutory 3-judge court in the consolidated causes or,

in the alternative, to dismiss the appeals on the ground that the questions raised by the appellants are so unsubstantial as not to require further argument.

While the judgment is one which otherwise would be reviewable by the Supreme Court on direct appeal from the District Court, this appellee asserts that the unsubstantial character of the questions upon appeal stated by the appellants is so apparent on the face of the record as to warrant summary disposition of the appeals without further argument. This appellee asserts that under the applicable decisions the judgment of the 3-judge court must, in any event, be affirmed upon findings of the Court that the transportation by Capital Transit Company from point to point in the District, herein involved, is intrastate transportation and that the regulatory power in respect to such transportation lies with the District Commission, and that the Interstate Commerce Commission (Federal Commission) does not have jurisdiction or statutory power to promulgate the orders dated May 7, 1947, in Docket No. MC-C-891 and July 7, 1948, in Docket No. 28991, and that the order of June 22, 1945, in said docket is not now a valid order. The judgment must in any event be affirmed for the reason that since the transportation by Capital Transit Company involved in this proceeding is from point to point within the District of Columbia, the proviso of Section 216(e) of the Interstate Commerce Act (49 U. S. C. § 316 (e)) expressly denies to the Federal Commission the right or power to prescribe or in any manner regulate the rate, fare or charge for such intra-District transportation, or for any service connected therewith, for the purpose of removing discrimination against interstate commerce or for any other purpose whatever. The record shows that the Federal Commission found that Capital Transit Company discontinued transportation of passengers into the State of Virginia on March 31, 1947 (270 I. C. C. 651-652). The

appellee will show that the Federal Commission lacked jurisdiction and statutory power to promulgate the orders complained of for other reasons to be stated. Furthermore, Congress has vested in the District Commission exclusive regulatory power over intra-District transportation.

The particular matters relied upon by the District Commission to show that the questions raised by the appeal are too unsubstantial to require further argument, and to support its motion to affirm the judgment below or in the alternative to dismiss the appeals, are more particularly stated below.

## The Regulatory Power Asserted Was Expressly Denied to the Federal Commission

The District Court's judgment was that the proviso in Section 216(e) (49 U. S. C. § 316(e)) of the Act denied the Federal Commission powers it asserted. That proviso reads as follows: "That nothing in this part shall empower the Commission to prescribe, or in any manner regulate, the rate, fare, or charge for intrastate transportation, or for any service connected therewith, for the purpose of removing discrimination against interstate commerce or for any other purpose whatever."

The Federal Commission's findings on further hearing of July 7, 1948, 270 I. C. C. 651, at page 652, shows on its face that Capital Transit Company discontinued transportation into Virginia on March 31, 1947. Under Part II of the Act, the District of Columbia is defined as a State. All of the transportation by Capital Transit Company involved in these appeals is wholly within the District of Columbia. Therefore, it is "intrastate transportation." The proviso in Section 216(e) denies to the Federal Commission power to prescribe or in any manner regulate the rates, fares or charges "for intrastate transportation," or for any service connected therewith, for any purpose

whatsoever. The simple logic of the foregoing and the clear intent of Congress is that the Federal Commission could not prescribe or in any manner regulate the rates, fares, or charges for such intrastate transportation for any purpose whatever. Therefore, it had no jurisdiction or power to issue the orders of May 7, 1947, and July 7, 1948, and no power now to enforce the order of June 22, 1945.

That this was the clear intent of Congress is best demonstrated by House Committee Report No. 1645 of the 74th Congress, 1st Session, accompanying S. 1629 which became Part II of the Interstate Commerce Act. Page 2 of that report shows that the Committee on Interstate and Foreign Commerce incorporated by way of amendment the proviso in Section 216(e) herein above quoted. On page 4 of that report the Committee stated the reason for the amendment in the following language:

> "An amendment has been made by the committee which prohibits the extension of Federal regulation in intrastate transportation as exercised under authority of the decision of the Supreme Court in the *Shreveport* case and of the provisions of section 13 (4) of the Interstate Commerce Act."

Section 13 (4) referred to in the above quotation is a legislative enactment of the Shreveport doctrine whereby the Federal Commission could prescribe and regulate intrastate rates and charges of interstate *railroads*. By adoption and enactment of the amendment, Congress made clear its intention that the Federal Commission was not empowered to prescribe or regulate in any manner rates, fares and charges of intrastate transportation by *motor carrier*, or any service connected therewith.

The language of Mr. Justice Rutledge, speaking for the Court in *Panhandle Eastern Pipe Line Co.* v. *P. S. C.*, 332 U. S. 507, and the language of Mr. Justice Jackson, speaking

for the Court in *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U. S. 515, is most apposite when they said that words denying application of an act plainly mean that the act shall not apply, and that it is hard to believe that a denial of jurisdiction shall be read to confer jurisdiction.

## Regulatory Power Over the Transportation Involved Rests Exclusively With the District Commission

The Act creating the District Commission, 37 Stat. 974, gave it exclusive regulatory power over "the conveyance of persons or property within the District of Columbia for hire." Congress expressly provided:

> "This section shall apply to the transportation of passengers, freight, or property from one point to another within the District of Columbia, and any common carrier performing such service; and this section shall be so applicable and be so construed as to be free from conflict with those provisions of the Constitution of the United States and the laws in pursuance thereof relating to interstate commerce" (37 Stat. 977).

The Act creating the District Commission expressly denied to the Federal Commission exercise of power which was formerly vested in it prior to the creation of the District Commission. Paragraph 96 of that Act provides:

> "That the said commission shall hereafter exercise all the powers and have all the authority now vested by law in the Interstate Commerce Commission by virtue and under the Act of Congress approved May twenty-third; nineteen hundred and eight, entitled 'An Act authorizing certain extensions to be made of the lines of the Anacostia and Potomac Railroad Company, the Washington Railway and Electric Company, the City and Suburban Railway of Washington, and The Capital Traction Company, in the District of Columbia, and for

other purposes,' and said power and authority shall no longer be exercised by said Interstate Commerce Commission: *Provided*, That the orders, rules, and regulations made by the Interstate Commerce Commission shall continue to be in force until changed, repealed, altered, or amended by the commission created by this section, which said commission is hereby given power and jurisdiction to issue and, at its pleasure, to revoke all permits or licenses, to carry this section into effect, and its rules and regulations shall be valid and binding on all public-service corporations and on all persons" (37 Stat. 995).

The foregoing grant of power is further shown by Section "Thirteenth" of the Merger Act, approved January 14, 1933, 47 Stat. 752, 757, c. 10.

**Applicable Decisions Show That the Questions on Appeal Are Not Substantial and That the Judgment Must Be Affirmed in Any Event.**

The judgment of the District Court is not in conflict with *U. S.* v. *Capital Transit Company*, 325 U. S. 357. When the underlying facts of that case are contrasted with the underlying facts on further hearing resulting in the order of July 7, 1948, in Docket No. 28991, it is found that the judgment appealed from is in keeping with the principles of that decision. The judgment reflects a direct application of the principles pronounced by this Court in *U. S.* v. *Yellow Cab Co.*, 332 U. S. 218, and *Pennsylvania R. Co.* v. *Knight*, 192 U. S. 21, 48 L. Ed. 325, and an unbroken line of decisions, none of which are in conflict with the decision in the *Capital Transit* case. The judgment appealed from is the application of the well-established principles stated by this Court in *Wilson* v. *The Black Bird Creek Marsh Co.*, 2 Pet. 245, 7 L. Ed. 412 and *Cooley* v. *Board*, 12 How. 299, 13 L. Ed. 996, and followed right down to the recent decision in *Panhandle*

*Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U. S. 507.

In view of the acceptance and application by the 3-judge court of the principles so clearly enunciated in the *Cooley* case and so consistently followed to the *Panhandle* case, it is obvious that the questions on appeal are too unsubstantial to require further argument before this Court, and that the judgment must be affirmed.

By an unbroken line of decisions between the pronouncement of the *Cooley* doctrine and the well-reasoned opinion and application of that doctrine in the *Panhandle* case (without a dissent), this Court has consistently adhered to the principle adopted and applied by the District Court to the facts in the case at bar. From *Cooley* to *Panhandle*, this Court has charted a course that is clear and easy to follow by one who is not detoured by a misunderstanding and a misreading of the signs along the way.

It is true that under other or dissimilar facts, this Court has charted other courses equally clear. In relying upon the authorities cited by the Federal Commission in its orders here under attack, that body has been detoured by failing or refusing to recognize the nonexistence of facts upon which the Court rested its decision in *U. S.* v. *Capital Transit Co.*, 325 U. S. 357. In bringing this appeal, the appellants have either misunderstood the facts and the application of the established principles to those facts, or they have blindly shut their eyes to changed facts and circumstances and seek to follow a course charted under different facts and leading to a wholly different principle.

The *Cooley* case has stood for nearly 100 years. It was recently cited with approval by this Court in the *Panhandle* case. Questions raised by appeal which depart from that 100-year old principle cannot be substantial enough to warrant this Court hearing new argument in connection there-

with. A reluctance or refusal to recognize changed circumstances and changed facts is not sufficient to ask this Court to break a 100-year old principle. For that reason, this Court should affirm the judgment of the District Court, or, in the alternative, dismiss the appeals.

In support of the judgment of the District Court and to justify affirmance of that judgment or a dismissal of the appeal, may be cited a few of the decisions of this Court which show that the questions raised by the appeal do not merit further argument before this Court and that in any event the judgment will have to be affirmed. In addition to the *Cooley* and *Panhandle* cases we cite *Pennsylvania R. Co.* v. *P. U. C. (Ohio)*, 298 U. S. 170; *Pennsylvania R. Co.* v. *Knight*, 192 U. S. 21, 48 L. Ed. 325; *The Minnesota Rate Cases*, 230 U. S. 352, 398, 402; *Southern Pacific Co.* v. *State of Arizona*, 325 U. S. 761; *Port Richmond Ferry* v. *Hudson County*, 234 U. S. 317; *Duckworth* v. *State of Arkansas*, 314 U. S. 390; *Milk Control Board* v. *Eisenberg Farm Products*, 306 U. S. 346; *Eichholz* v. *P. S. C.*, 306 U. S. 268; *State of North Carolina* v. *U. S.*, 325 U. S. 507.

The position of the District Commission is clearly stated in the foregoing and other similar decisions. In some of the authorities cited will be found facts which have charted a course requiring federal regulation. But in such instances, it has been done upon the application of the general rule to the facts there involved. To illustrate, the principle contended for by the District Commission is stated in *Southern Pacific Co.* v. *State of Arizona*, *supra*, but, as pointed out by the late Chief Justice Stone in that case, the matters for ultimate determination are the nature and extent of the burden there imposed by state regulation upon interstate commerce, and whether the relative weights of one against the other are such as to make inapplicable the rule that the free flow of interstate commerce and its freedom from local

aints in matters requiring uniformity of regulation
nterests safeguarded by the Commerce Clause from
interference. Upon the facts of that case, in applying
pplicable rule, the Court found that the state burden
ed upon interstate commerce outweighed the ad-
ges of local or state regulation. This represents one
ose cases where, because of the facts in the case, a
e has been charted different from the *Cooley* formula.
appellants have misunderstood the facts and reasons
ag to the two distinct doctrines.

is is illustrated by the Federal Commission's resting
risdiction upon *Baer Bros. Mercantile Co.* v. *Denver &*
*R. Co.*, 233 U. S. 479, and *Rush Common Carrier Ap-*
*ion*, 17 M. C. C. 661. It utterly refused to recognize
ifference in the facts in the *Baer Bros.* case and the
of the case at bar, and the reasoning of the Court in
case. Baer Bros., located in Leadville, Colorado, en-
into a contract with a brewing company in St. Louis,
for beer to be shipped from Missouri to Colorado under
arrangement" whereby each car of beer was delivered
e Missouri Pacific Railroad to the Rio Grande Railroad
n an expense bill which described the shipment and dis-
d the charges paid by or due to the Missouri Pacific."
Rio Grande then forwarded the car, "naming the Mis-
Pacific as consignor and the Baer Company as con-
e." This Court held in that case that there was in fact
rough shipment from St. Louis, Missouri, to Leadville,
rado," and that when goods shipped from a point in
tate to a point in another state are received in transit
state common carrier under a "conventional division
e charges," such carrier shall be deemed to have sub-
d its road "to an arrangement for a continuous car-
or shipment." The Court further said that there was
mmon "arrangement" between the two carriers was

shown by the long-continued course in dealing, and the division of the charges, with the knowledge that it had been paid as compensation for the "single haul." The facts in that case clearly show that the shipment involved was an interstate shipment, so understood by all of the parties, including the railroad carriers, and the separate charges collected by one company or the other and divided between them under an "arrangement" that had long been in practice. The facts of the *Beer Bros.* case and the facts in the case at bar are at the two extremities of the pole.

In *Rush Common Carrier Application*, 17 M. C. C. 661, also relied upon by the Federal Commission, Rush was under a contract to haul ore and concentrates from the mines to the interstate railroad station, from which point "the ore moves generally to points outside of Idaho." Under the contract he was also required to haul machinery and supplies moved to the station by rail "generally from points outside the State." The contract required Rush to load the ore and concentrates at the mine and reload the same into suitable cars on the tracks of the interstate rail carrier. In that case, the Federal Commission found that from "the time of the movement of the ore is commenced it is intended for an interstate destination and is carried by applicant by truck and loaded by him into cars at the rail station in furtherance of that intention" (17 M. C. C. 661, 664). In a reluctant concurring opinion with the result reached, Chairman Eastman pointed out that Rush started the ore and concentrates on a journey which he *knew to be interstate* with "a definite intention on the part of the consignor that they shall move through to a destination in another State" (p. 676). Chairman Eastman, the outstanding authority in this field, was careful to point out the local character of certain transportation which should be considered intrastate rather than inter-

state, even though such transportation is related to interstate movement. He said:

> "Many illustrations come to mind, such as the taxi, bus, or street car which takes the interstate passenger and his baggage to the railroad station, or the local carter who does the same with his trunk, or even the messenger or carter who takes letters or parcels to the post office and mails them to a destination in another State. * * *
>
> "That there are many motor carriers which perform such an 'independent local service, preliminary or subsequent to any interstate transportation,' a service which may have a 'close relation to interstate commerce' but is nevertheless 'not properly to be regarded as a part of it,' I have no doubt. Nor do I doubt that such service should be subject to local rather than national regulation" (p. 682).

Chairman Eastman cited *Pennsylvania R. Co.* v. *Knight*, 192 U. S. 21, and said the Court's reference to "independent local service, preliminary or subsequent to any interstate transportation" was based "on sound reason and has a peculiar pertinence to certain phases of motor-carrier transportation" (p. 681). He said "local" transportation, even when related to or associated with interstate commerce, is "not of any national consequence," and that its regulation by the Federal government "is in no way necessary for the proper protection of interstate or foreign commerce" (p. 682).

There is no similarity between the facts of the *Baer Bros.* and *Rush Common Carrier* cases and the facts in the case at bar. Capital Transit Company does not have an "arrangement" whereby it undertakes to transport a passenger from the District to either of the Virginia companies operating into Virginia. It can have no knowledge, and therefore no intent, as to the destination of a pas-

senger who boards its vehicles to go by the Virginia lines to Virginia or by other common carriers to any other place in the United States. Capital Transit Company does not know, when a passenger boards its vehicle, whether that passenger is making an interstate "trip" or whether he is making the usual and ordinary local movement. These things are true of those passengers who board the Company's vehicles in the District to begin interstate "trips," as well as those who board its vehicles in the District after they have completed interstate "trips." The Company makes no contract with its passengers to transport them beyond the end of its line in the District of Columbia. Under orders of the District Commission, it has no authority to make such contracts or to engage in such transportation.

The interstate "trips" made by passengers who ride the vehicles of Capital Transit Company are made by entering vehicles of the Virginia companies within the District of Columbia and being transported by the Virginia companies over their "interstate routes" to points in Virginia. The same is true of the return trips. The passengers board the vehicles of the Virginia companies in Virginia and alight from them within the District of Columbia. Consequently, the "interstate transportation" is performed by the Virginia companies, not by Capital Transit Company. When the passenger enters a vehicle of Capital Transit Company, that company does not know whether the passenger has alighted from an interstate vehicle or originated his trip within the District, or whether, when he leaves the vehicle, he has terminated his local trip or intends to continue a trip which itself may be interstate in character. Just a bare statement of the facts in the *Beer Bros.* case and *Rush Common Carrier Applications*, upon which the Federal Commission rested its juris-

diction, contrasted with the facts in the case at bar, shows that the questions raised by this appeal are not substantial and do not justify argument.

The Federal Commission said that *U. S.* v. *Yellow Cab Co.*, 332 U. S. 218, does not support Capital Transit's position. The Commission failed to distinguish between the decisions under Part II and Part III of that case. In Part II, which the Federal Commission must have considered to reach its conclusion, the transportation involved was from one train to another train by taxicab as part of an interstate train trip, usually paid for as part of a single train fare. It should be obvious to any one that such transportation is interstate. But the Commission failed to recognize that the transportation involved in Part III was similar in nearly all respects to the transportation by Capital Transit Company in the case at bar, that is to say, transportation by taxicab from or to home, office or hotel from and to interstate railway stations, which the Court said "is too unrelated to interstate commerce to constitute a part thereof." When the Federal Commission said that Capital Transit Company's position was not supported by the *Yellow Cab* case, it could not have meant the decision in Part III of that case. The facts at bar and those involved in Part III of the *Yellow Cab* case are parallel. The Federal Commission has failed to recognize the distinction the Court made between interstate "service" of a carrier and an interstate "trip" of a passenger.

On page 8 of their statement that the questions presented are substantial, the appellants United States and Federal Commission said the inappositeness of the *Yellow Cab* case is clearly shown by the fact that taxicab service is expressly excluded from the purview of the Interstate Commerce Act by Section 203(b)(2). But the appellants fail to state that the decision in Part III was that the

"service" rendered was not "interstate service." The Court's decision was not based upon the question whether taxicabs were or were not subject to Part II of the Interstate Commerce Act. That question was not before the Court. The appellants fail to state that the taxicab service involved in Part II of the *Yellow Cab* case was held by this Court to be part of an interstate service.

**The Judgment Is Not in Conflict With United States v. Capital Transit Co., 325 U. S. 357**

The appellants United States and Federal Commission argue in their statement as to jurisdiction (pages 5 and 6) that the District Court was misled by the distinctions between the case at bar and *U. S.* v. *Capital Transit Co.*, 325 U. S. 357, and that the cessation of operation of Capital Transit into Virginia is of no significance. They also say the fact that the shooting phase of the war is over is immaterial. But these facts go to the very heart of the decision in *U. S.* v. *Capital Transit Co.*, 325 U. S. 357.

Both the report of the Commission, dated January 18, 1944, 256 I. C. C. 769, and the decision of the Court clearly and unmistakably show that the conduct of war and the physical operations of Capital Transit Company into Virginia constituted the basic reasons for the action of the Commission in instituting its original investigation and issuing its order, and the decision of the Supreme Court.

The Commission opened its report of January 18, 1944, with the significant statement that the investigation was instituted at the request of the Secretary of War and concurred in by the Secretary of the Navy. The Commission further said that the transportation service then rendered by Capital Transit Company into Virginia "was instituted at the urgent request of the War Department in order to furnish needed transportation." 256 I. C. C. at page 771. The Commission found that "The primary reason set

forth by the Departments for the institution of this investigation was the large turnover of employees in the Virginia installations" (p. 783). It said its decision "must be predicated also upon the facts and circumstances at present known," and accordingly held—

> "In view of the existing emergency, we find that the fares found reasonable should be made effective as soon as practicable" (p. 784).

In the proceedings on further hearing, the Secretary of Defense who now represents both the War and Navy Departments, did not participate. Neither did the Secretary of the Navy. In the record on further hearing, the testimony was not that the "primary reason" for the investigation was due to a large turnover of employees in the Virginia installations. On the contrary, only one Department testified on that subject, and the testimony of the witness was that transportation costs and services *were not a major cause* of inability to employ personnel. The record indicates that a major cause was inadequacy of compensation to certain employees. In the record on further hearing, the Federal Commission itself found that Capital Transit Company no longer transported persons into the State of Virginia.

If the facts set forth in the report of January 18, 1944, were important enough to cause the Federal Commission to find that it was necessary to assert a power under Section 203(b)(8), it seems strange that the absence of those same essential facts are of no significance now.

That these distinguishing facts in the 1945 decision were considered important by the Court is abundantly shown by the decision and the clear cut language there found. Mr. Justice Black, speaking for the Court, said that Section 203(b) of the Act authorized Commission action if it were found necessary (1) to carry out the national

transportation policy and (2) if the carrier was not engaged in intrastate transportation over the entire "interstate route." It is significant to point out that the record on further hearing shows Capital Transit Company does not have an "interstate route" into Virginia. The Court decided the 1945 case on the first reason stated, without deciding the second. The Court thought that the "primary reason" for the large turnover of employees was of significant importance because it pointed out that on the second hearing the Commission had evidence from employees of both the Army and the Navy as to dissatisfaction with fares. It held that the findings of the Commission that unreasonably high rates were calculated to disturb the morale of workers "and thus to impair the national defense program" were well supported (p. 361). A significant fact found by the Court was that these rates "applied almost exclusively to workers engaged in national defense" (p. 361), which is not true now. It said that regulation of these rates was rightly a matter of concern to the Army and Navy Departments, "charged with the serious responsibility of *conducting a war. The employees worked in the very center of activities essential in that cause.* Congress unequivocally reserved to the Commission power to regulate reasonableness of interstate rates *in the light of the needs of national defense*" (p. 362) (Emphasis supplied). It ill behooves the Federal Commission and the United States, who so insisted upon the importance of these facts in *U. S.* v. *Capital Transit Co.*, 325 U. S. 357, to say that they are now insignificant. The existence of those facts were given importance by the Court. Their absence now is just as significant.

Another important fact in the 1945 case distinguished from the facts in the case at bar is found in the language of the Court that the Commission found "that Transit had voluntarily established through routes" (p 362) and that

"Transit Company itself conducted its own traffic to and from Virginia and District residential points as one continuous journey" (p. 364). The Court reached the conclusion that "As carried out by Transit the arrangements were the exact equivalent of transportation on a 'through route' for a joint fare" (p. 364). Upon these factual findings, which do not exist in the record on further hearing, the Court reached the conclusion in the 1945 case—

> "We think that under the facts and circumstances shown the Commission's findings are not subject to attack and that it acted within its statutory authority in prescribing the through rates" (p. 363).

The case of *U. S.* v. *Yellow Cab Co.*, 332 U. S. 218, where the Court said local transportation of passengers who themselves were engaged in interstate "trips" was too unrelated to interstate commerce to constitute a part thereof, was decided in June, 1947, when this country was not engaged in the conduct of a war. As the Court decided *U. S. v. Capital Transit Co.*, 325 U. S. 357, "under the facts and circumstances shown," it follows that under the "facts and circumstances shown" in the present record, the Federal Commission had neither jurisdiction nor statutory power to issue the orders of May 7, 1947, and July 7, 1948, nor, under the presently known "facts and circumstances," is the order of June 22, 1945, now a valid order.

**The Federal Commission Lacked Power to Issue the Orders for Lack of Evidence and Essential Findings to Support Them.**

Section 203(b)(7a) (49 U.S.C. § 303(b)) would take from the prohibition of the application of Part II to certain transportation if the Federal Commission shall from time to time "find" that the application is necessary to carry out the policy laid down by the Act. To make the "find-

ing" necessary there must be a finding of the necessity for the asserted exercise of power. It must be upon substantial evidence. The report and findings upon which is predicated the order of July 7, 1948, neither recites the evidence which is essential to every element required by Section 203(b)(7a) and (8), nor does it contain the basic and essential findings to support the order. It is true that the Federal Commission did state certain conclusions, but those conclusions are not based upon evidence. If there was no evidence upon which essential findings could be made, "there was no jurisdiction to make the order. • • • A finding without evidence is beyond the power of the Commission." *I.C.C.* v. *Louisville and Nashville R. Co.*, 227 U. S. 88, 92. This requirement is basic and jurisdictional. *U. S.* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 504-505.

There is no evidence in the record on further hearing to show that it is necessary for the Federal Commission to prescribe rates and charges for transportation by Capital Transit Company wholly within the District of Columbia in order to carry out the national transportation policy, nor the relationship between the prescription and regulation of such fares and charges to that policy. There are no basic and essential findings by the Federal Commission that the prescription of rates and charges for local transportation has any effect upon the national transportation policy or the relationship between the prescription of such charges and that policy.

The Federal Commission did not make the necessary basic findings as to the effect of the rates and charges and division of charges prescribed by it upon the revenue, earnings, or return of Capital Transit Company. Without such findings the Commission was without power to issue the orders. *State of North Carolina* v. *U. S.*, 325 U. S. 507. Its prescription of the rates and the division of rates are

contrary to evidence in the record that the rates prescribed by it prior to the effective date of its order of July 7, 1948, were less than the cost of service to Capital Transit Company and, therefore, confiscatory. These confiscatory rates and the divisions thereof were stated by the Commission to be reasonable for the period on and after June 22, 1947, as shown by 270 I.C.C. at page 664.

Contrary to the evidence in the proceedings on further hearing, the Federal Commission reached the unsupported conclusion that the commercial zone exemption authorized by Section 203(b)(8) was not applicable. The support for this statement is "As previously found." 270 I.C.C. at page 655. Contrary to the evidence on further hearing that Capital Transit Company no longer operated into the State of Virginia, and that the services were no longer used or necessary in aid of national defense or in carrying out the national transportation policy, the Commission goes back to its record made in war days when the Company was operating into Virginia and reaches the conclusion just stated, because it had "previously" reached such conclusion. It reached the ultimate conclusion to be determined by stating that:

> "The joint fare applies to transportation that falls within the definition of 'interstate commerce' contained in Section 203(a)(10), * * *" (p. 655).

This ultimate conclusion should have been determined upon evidence and after essential findings. There is no evidence to support such conclusion, and there are no basic or essential findings necessary to support the conclusion stated. It reaches the ultimate conclusion that application of Part II to the transportation considered "was necessary in order to carry out the national transportation policy" (p. 656). There is no evidence in the record on further hearing to support such a conclusion. The conclusion there stated was

the ultimate conclusion that should have been based upon evidence and after essential findings upon that evidence. The Federal Commission reached what should have been an ultimate conclusion based upon evidence and after essential findings by stating that the national transportation policy contemplates a national transportation system that will, among other things, meet the needs of national defense, "and it applies in peacetime as well as in wartime" (p. 657). There is no evidence in the record on further hearing to support any such conclusion. The Federal Commission fails to cite any evidence on the point and it makes no basic and essential findings to support its ultimate conclusion.

The Federal Commission stated a basic conclusion that the rates prescribed by it would be reasonable, "including transfer privileges of the Transit Company" (pp. 662-663). There is no evidence in the record to support any such conclusion. To the contrary, there is uncontroverted evidence in the record that the rates prescribed and the division thereof allowed to the Capital Transit Company were not reasonable, and on the other hand were confiscatory. Again, the Federal Commission stated its ultimate conclusion without stating the evidence upon which it reached such conclusion and without making the basic and essential findings.

It made no finding of the effect of the rates and the division of the rates upon the revenues of Capital Transit Company (nor of the other companies). The Federal Commission simply reached the conclusion that a fare prescribing a division of 7 cents to Capital Transit Company would be a reasonable division. There is not a word of evidence in the record that 7 cents is a proper division of the prescribed fare between the Virginia Companies and the Capital Transit Company. There is evidence that 10 cents would have been a proper division at that time. The Com-

mission made no basic findings upon the point. It simply accepted a proportionate division of the old rate that had been prescribed over objections of Capital Transit Company. The only reason it gives for its conclusion is that the "record affords no basis for changing the divisions" (p. 663). That is not enough.

In its Order No. 3422, the District Commission found after investigation and full hearing that a cash fare of 10 cents was less than a reasonable fare for transportation by Capital Transit Company within the District of Columbia and increased it to 13 cents. This rate is based upon evidence of record and supported by basic findings.

The character of the deductions reached in the report dated July 7, 1948, is condemned by Mr. Justice Black, speaking for the Court in *State of North Carolina* v. *U. S.*, 325 U. S. 507. There, this Court said that the Federal Commission—

> "is without authority to supplant a state-prescribed intrastate rate unless there are clear findings, supported by evidence, of each element essential to the exercise of that power by the Commission." (p. 511).

The method of prescribing the divisions in the order of July 7, 1948, was condemned by the Court in the *North Carolina* case where the Commission had simply found and concluded that the interstate rate of 2.2 cents was just and reasonable, and that the accommodations afforded interstate and intrastate passengers were "substantially similar," that in general the passengers traveled in the same trains and in the same cars "and from these, it concluded that since interstate passengers were forced to pay higher fares than intrastate passengers, there was an undue and unreasonable disadvantage and prejudice of interstate passengers." Upon such a conclusion this Court said "We think these findings failed to give adequate support to the

order." (p. 512). The Court said that the power of the Commission to require a state to raise intrastate rates "depends upon whether intrastate traffic is contributing its fair share of the earnings required to meet maintenance and operating costs and to *yield a fair return on the value of property directed to the transportation service* both interstate and intrastate." (p. 520). Because the order of the Commission was not based upon adequate findings supported by evidence, the Court held the order was invalid. In neither of the orders here under attack has the Federal Commission made a finding whether the prescription of fares or divisions thereof contribute their fair share of the earnings required to meet maintenance and operating costs and to yield a fair return on the value of the property used in the service.

That the orders here under attack, and in particular that of July 7, 1948, do not contain that high standard of certainty and sufficient basic facts to support them is shown by abundant authority. The decision in *U. S.* v. *Baltimore & Ohio R. Co.*, 293 U. S. 454, 462-464, is particularly applicable to the report of July 7, 1948, where this Court condemned an order because so much was left to inference and so many of the conclusions reached were mere deductions and conclusions rather than basic findings. The orders here under attack do not meet the standard set in *State of Florida* v. *U. S.*, 282 U. S. 194.

In the *State of Florida* case, the action of the Commission was condemned because there were no findings as to the effect of the maintenance of the intrastate fares upon the revenues of the carriers or the effect of the rates both as existing and prescribed upon the income of the carriers, nor the expected revenue that may be derived, as well as for stating conclusions rather than making basic and essential findings. In the *State of North Carolina* case, the report of the Commission was condemned because the con-

clusions supporting the order were mere generalities and conclusions rather than essential findings, and because the Commission had not made the necessary findings that the prescribed rates would contribute their fair share of earnings or yield a fair return on the property used. In *U. S. v. Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, the Commission's order was condemned because the conclusion stated was a long and discursive narrative which was "nothing more than a deduction," and because the Court was left "to choose between conflicting inferences." The Court said that adequate findings are necessary and jurisdictional.

Not only must there be (1) substantial evidence and (2) necessary basic findings to support the asserted power under Section 203(b)(8), but when so supported and so found Congress said it should be applied only to "transportation of passengers or property in interstate or foreign commerce." The record shows on its face that Capital Transit Company does not operate into Virginia. The transportation here involved is wholly within the District of Columbia. It is, therefore, not "transportation in interstate commerce." It follows that it is not the kind of transportation which the Federal Commission could regulate under Section 203(b)(8).

The language of Section 203(b)(8) is specific. It does not provide that when findings are made as required by clause (7a) that Part II of the Act shall be applied to one "*engaged* in interstate commerce." The section does not apply to "interstate commerce." It applies, as Congress expressly stated, to *transportation* in interstate commerce.

The Federal Commission found that on March 31, 1947, "the Transit Company discontinued physical operations in Virginia in connection with the transportation of passengers between points in the District and the Pentagon Building." 270 I. C. C. at page 652. This long and laborious

finding about the Company having "discontinued physical operations in Virginia in connection with the transportation of passengers between points in the District and the Pentagon Building" means nothing more nor less than that since March 31, 1947, Capital Transit Company "has not engaged in transportation in interstate commerce," or "has not transported passengers to Virginia."

It will be observed that Congress did not use the words "*engaged* in interstate commerce" in making applicable Section 203(b)(8). It used apt words to express its intention that the section should be applicable only to "*transportation* in interstate commerce." Congress was careful in its choice of words and phrases. It did not extend the applicability of the section beyond "transportation."

If Congress had intended to make Section 203(b)(8) applicable to any other than "transportation" in interstate commerce, it would have said so in apt words, or it would have added after the word "transportation," the phrase "or for any service connected therewith," as it did in Section 216(e); or it would have used the phrase "and all other matters relating to or connected with the transportation of passengers in interstate or foreign commerce," as it did in Section 216(a) and in Section 216(b) (49 U. S. C. § 316(a) and 316(b)).

If Congress had intended to make Section 203(b)(8) applicable to "interstate commerce" as those words are employed in Section 203(a)(10), as the appellants contend in this case, it would have used the words "engaged in interstate or foreign commerce," as it did in Section 216(d) (and in Section 22(b) of the Transportation Act of 1940, 54 Stat. 924, in amending Section 216(d)), and as it did in Section 222(e) (49 U. S. C. § 322(e)). If Congress had intended the application of Section 203(b)(8) to "interstate commerce" as contended for by the appellants, it could have

used such phrases as "practice affecting" such service or the "service thereunder," as it did in Section 216(g) (49 U. S. C. § 316(g)).

Congress did not make the section applicable to transportation "and all service in connection therewith," as it did in Section 217(a) and 217(b); or "practice affecting" charges, as it did in Section 218(a) as originally enacted; or the words "for any service rendered or to be rendered in the transportation," as it did in Section 23(a) of the Transportation Act of 1940, 54 Stat. 925, amending Section 218(a). Nor did Congress use the expression "and practices relating thereto," as it did in Section 22(d) of the Transportation Act of 1940, 54 Stat. 924, amending Section 216(i) of the Act (49 U. S. C. § 316(i)). If Congress had intended the application of Section 203(b)(8) in the manner argued by the appellants, it could have used the phrase "the transportation of passengers or property or in connection therewith" as it did in Section 23(b) of the Transportation Act of 1940, 54 Stat. 925, in amending Section 218(b); or it would have used such language as "any service connected with such transportation," as it did in Section 225 of the Act (added by Section 25(a) of the Transportation Act of 1940, 49 U. S. C. § 224a).

The distinguishing words in Section 203(b)(8) are emphasized and made more significant by employment in the exception of clause (8) and in the proviso of clause (8) of the words "such transportation." In both of these instances, Congress evidenced an intent to limit the applicability of Section 203(b)(8) to "transportation." Otherwise, it would have used in one or both of such clauses language such as "such interstate commerce," or other language to show an intent of a broader meaning. But nowhere in Section 203(b)(8) did Congress use the broad language or expressions found in other sections of the Act to indicate

an intention to cover "interstate commerce," as contended for by appellants. If Congress intended the broad application contended for by the appellants, it seems passingly strange that it did not use appropriate language to do so when it did use such language in other sections intended to apply to "interstate commerce," as those words are used by the appellants.

That Congress intended the application of Section 203(b)(8) only to "transportation" is further indicated by the proviso in clause (8) that it shall not apply if the motor carrier engaged in transportation "over *regular or irregular route or routes* in interstate commerce is also lawfully engaged in the intrastate transportation of passengers over the entire length of such *interstate route or routes* in accordance with the laws of each State having jurisdiction." (Emphasis supplied.) Capital Transit Company does not have an "interstate *route*." Since it does not transport passengers into Virginia, it can not have an interstate *route*. The language just quoted is a clear demonstration that Congress intended that Section 203(b)(8) should be applied only to one engaged in "transportation" in interstate commerce over an "interstate route."

Furthermore, Section 203(b)(7a) does not make applicable the exception in clause (8) unless the "transportation is under a common control, management, or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone." There is not a word of evidence in the record to show that there is a common control or management of Capital Transit and the Virginia Companies, or that there is a continuous carriage. Not only is there an absence of such evidence in the record, but the evidence shows on the contrary that there is no such common control, management or arrangement. There is no "arrangement" or "long continued practice"

and "conventional division" of rates as there was in *Baer Bros. Mercantile Co.* and *Rush Common Carrier Application*, relied upon by the Federal Commission. Nor did the Federal Commission make such a finding. In the absence of such an essential finding to make applicable the section, the Federal Commission was without jurisdiction or power to issue its orders.

## Conclusion

It is respectfully submitted that the questions raised on appeal are not of such substantial character as to justify further argument before this Court; that upon the facts of record on further hearing and in the light of applicable decisions of this Court, the Court must in any event affirm the judgment of the District Court. It is respectfully submitted that the judgment should be affirmed or, in the alternative, that the appeals be dismissed.

WHEREFORE, the District Commission moves the Court that the judgment of the District Court be affirmed or, in the alternative, that the appeals be dismissed.

Respectfully submitted,

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